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No. 07-1073

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In The Supreme Court of the United States

JOHN CRANE INC.,

Petitioner,

v.

SANDRA KAY ONEY,
Executor of the Estate of
SHARON VAUGHN ONEY, Deceased,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION

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NATURE OF THE CASE AND MATERIAL PROCEEDINGS

John Crane asks this Court to render an advisory opinion curing John Crane's failure to follow basic procedural and evidentiary rules by dramatically changing settled maritime joint and several liability and apportionment law. The change John Crane advocates would allow it obtain an allocation of fault against a wishlist of "potentially responsible entities" without bringing those entities before the court, without proving those entities were negligent, and without offering any evidence that the entities' products contributed to the Plaintiff's disease. John Crane also summarily asks this Court to revisit for the fourth time its maritime jurisdiction decision in *Executive Jet Aviation, Inc. v City of Cleveland*, 409 U.S. 249 (1972). *See also Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995); *Sisson v. Ruby*, 497 U.S. 358 (1990); *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982). This Court should deny John Crane's petition on both issues.

In 2004, Sharon Vaughn Oney began experiencing shortness of breath, chest pain, and pleural effusion, the clinical symptoms of mesothelioma. After major surgery in January 2006, he received a pathological diagnosis of malignant mesothelioma, the "signal" cancer of asbestos exposure. From 1962 to 1972, Oney had worked on ships under construction and repair on the navigable waters of the James River at Newport News Shipyard (NNS) as a machinist, work that included routine and daily cutting, scraping, grinding and

hammering asbestos gaskets and packing. During the next ten years he supervised the same work. On February 21, 2006, he filed a Complaint alleging maritime claims for negligent failure to warn, breach of implied warranty, strict liability as restated in § 402A of the Restatement (Second) of Torts, and conspiracy against John Crane, Inc. and others. The Complaint requested compensatory damages of $10,000,000 and punitive damages of $5,000,000.

After suffering intractable pain for two years, Vaughn Oney died from mesothelioma on November 17, 2006. *John Crane's Petition*, Appendix, at 67a. His widow, Sandra Kay Oney, amended and revived the action as a wrongful death case in December 2006. *Id.* at 375a-379a. The jury trial commenced on March 26, 2007 against John Crane, the sole remaining defendant.

The case was tried under general maritime law. At the end of John Crane's case in chief, Plaintiff moved to "strike the defendant's evidence as to comparative fault of the plaintiff and also as to comparative fault as to any defendant except Garlock." *See John Crane's Petition*, Appendix, at 50a – 58a. The Plaintiff had settled with Garlock Sealing Technologies and she conceded that she, herself, had offered sufficient evidence to allow a setoff allocation against Garlock under *McDermott*. *See McDermott, Inc. v. AmClyde*, 511 U.S. 202 (1994) (allowing proportionate share allocation for setoff purposes). She contended, however, that there was insufficient evidence to permit allocation of damages against any other manufacturer or against Vaughn Oney. The trial court found no evidence had been

presented of Vaughn Oney's negligence. *John Crane's Petition*, Appendix, at 53a. The trial court also agreed that there was insufficient evidence implicating any entities other than John Crane and Garlock in Oney's death. *Id.* at 57a. Finally, the trial court upheld its pretrial ruling that maritime law did not allow apportionment against bankrupt entities against whom no claims had been made. *Id.* at 57a–58a. Thus the trial court struck John Crane's affirmative defenses of comparative fault as to Oney and as to any entity except Garlock Sealing Technologies, LLC.

John Crane requested that damages be apportioned between itself and Garlock. The jury awarded the Plaintiff $9,251,392.06 in compensatory damages and apportioned 60% of the damages to John Crane and 40% of the damages to Garlock, and it awarded interest at the legal rate beginning on July 11, 2007. As a result, John Crane is liable only for its own 60% share of the total verdict — $5,550,835 plus interest and costs. *See John Crane's Petition*, Appendix, at 2a-4a.

John Crane appealed the verdict to the Virginia Supreme Court contending, *inter alia*, that the trial court erred by trying the case under maritime law. John Crane also complained that the trial court unfairly denied its request to allocate damages against entities that were never parties to the case, that never settled with the Plaintiff, and against which insufficient evidence was presented. The Virginia Supreme Court denied John Crane's Petition for Appeal, and John Crane now asks this Court for a writ of certiorari.

STATEMENT OF FACTS

Vaughn Oney began his employment at the Newport News Shipbuilding and Dry Dock Company (NNS) in 1962. *John Crane's Petition*, Appendix, at 111a. He testified he routinely and daily cut, scraped, grinded and hammered asbestos-containing marine gaskets and packing materials manufactured by John Crane until approximately 1972 when he became a supervisor. *Id.* at 120a, 124a-130a, 148a-153a. From 1972 to approximately 1980, he continued to be exposed to John Crane's products as he supervised the same type of work. *Id.* at 114a. Mr. Oney also identified Garlock, Flexitallic and Johns Manville as manufacturers of products he used at NNS. *Id.* at 120a, 124a-130a, 148a-153a. In response to questioning from John Crane's counsel, Mr. Oney stated that of the different brands, he used John Crane the most and Johns-Manville the least. *See id.* at 148a-150a. Mr. Oney's coworkers also identified John Crane, Garlock, Johns-Manville, and Flexitallic products. *See, e.g., id.* at 64a, 81a-101a.

The Plaintiff's materials expert, Dr. William Longo, testified that he bulk sampled John Crane's and Garlock's products and that they contained from 50% to 70% asbestos. *Testimony of William Longo*, Apr. 2, 2007, Appendix, at 8a-9a. He also testified that he tested John Crane's and Garlock's products to determine if they released respirable asbestos fibers. His tests demonstrated that these manufacturers' products released from 1.5 fibers per cubic centimeter (f/cc) to 24 f/cc of unbound asbestos fibers – levels 3,000 to 7,000 times the background of his testing chamber, 750,000 to 1,000,000 times the

levels of asbestos in outdoor ambient air in the United States, and far above OSHA's current permissible exposure limit (PEL). *Id.* at 3a-6a, 11a-20a. Fiber Release testing by Dr. Millette (another materials scientist), the NNS, and the Naval Shipyard at Bremerton, Washington corroborated Longo's results.[1] *Id.* at 7a, 9a-10a, 13a, 20a-23a. Mr. Oney's coworkers viewed videos of Longo's tests and testified that the work methods used during the fiber release testing on John Crane's and Garlock's gaskets and packing were substantially identical to the work methods they used on these products at NNS.

The Plaintiff's medical expert, Dr. John Maddox, is a pathologist at Riverside Hospital in Newport News, Virginia. He has diagnosed over 1,000 cases of mesothelioma. But, though he has some familiarity with various asbestos product types from his medical practice, he is not an expert in industrial hygiene, materials science, or product types. During cross-examination, Dr. Maddox admitted that he was aware that various generic product types such as pipe insulation, cement, cloth and boilers may have been used on the ships on which Mr. Oney worked. But no party offered any evidence showing the manufacturer or supplier of these generic product types, or whether these products actually contained asbestos. Additionally, no party offered any evidence showing that these generic product types, or the Flexitallic and Johns-Manville products, (i) released respirable asbestos fibers, (ii) the number of fibers released, if any, (iii)

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[1] Dr. Longo's testimony is unchallenged in this appeal.

any other specific evidence of asbestos exposure to Mr. Oney from these products, or (iv) any negligent conduct on the part of an entity responsible for these products.

John Crane quotes Dr. Maddox as testifying that "all products to which Mr. Oney was exposed were 'significant and substantial contributing causes to the development of his malignant mesothelioma.'" *John Crane's Petition*, at 8. Yet John Crane omits a critical caveat. Dr. Maddox stated that "*to the extent he breathed in asbestos fibers* from all of the products that he worked with at the shipyard, all of those exposures were significant and substantial, contributing causes to the development of his malignant mesothelioma." *John Crane's Petition*, Appendix, at 77a-78a (emphasis added); *id.* at 81a (testifying "*as long as those were asbestos-containing gaskets that released fibers that he breathed* . . . they would all contribute" (emphasis added)). Stated differently, Dr. Maddox testified that an exposure was "significant and substantial" only "to the extent" Mr. Oney "breathed in asbestos fibers from" the product. *Id.* at 77a-78a. And, as discussed above, there simply was no evidence from any party that any product other than those manufactured by Garlock and John Crane released respirable asbestos fibers.

PRINCIPLES OF LAW, ARGUMENT, AND AUTHORITIES

This Court should deny John Crane's petition on both issues asserted. First, this Court should decline to issue an advisory opinion changing settled

law relating to maritime joint and several liability and apportionment to cure John Crane's own failure to follow basic procedural and evidentiary rules. Second, this Court should refrain from revisiting, for the fourth time, the contours of its maritime jurisdiction decision in *Executive Jet Aviation, Inc. v City of Cleveland*, 409 U.S. 249 (1972), in a case that John Crane concedes is jurisdictionally identical to the *John Crane v.Jones* case for which this Court just denied certiorari.

I. MARITIME LAW AND THE EVIDENCE OFFERED AT TRIAL PERMITTED ALLOCATION OF FAULT ONLY BETWEEN JOHN CRANE AND GARLOCK.

John Crane concedes joint and several liability is the general rule in maritime law. *See John Crane's Petition*, at 7; *see also Norfolk & Western Railway Company v. Ayers*, 538 U.S. 135 (2003) (citing *The Atlas* 93 U.S. 315 (1876)); *McDermott, Inc. v. AmClyde*, 511 U.S. 202 (1994); *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979); *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975); *Coats v. Penrod Drilling Corp.*, 61 F.3d 1113 (5th Cir. 1995) (*en banc*); 1 Thomas J. Shoenbaum, ADMIRALTY AND MARITIME LAW § 5-14, at 232 (4th ed. 2004). John Crane claims, however, that *McDermott*, *Reliable Transfer*, and a law review Note written by a third year law student support its argument that this Court should allow it to obtain allocation against a wishlist of "potentially responsible entities" without (1) bringing any of those entities into the case, (2) proving that any of

those entities were negligent, and (3) proving that any of those entities caused the plaintiff's damages.

McDermott and *Reliable Transfer* do not support John Crane's argument, they refute it. And the lack of any evidentiary support against any entity other than John Crane and Garlock in this case would mean that an opinion issued by this Court would be purely prospective and advisory.

John Crane wanted the trial court to instruct the jury to apportion damages among the following: (1) two insolvent entities,[2] (2) generic products types like "pipecovering", "cloth", and "cement" for which no evidence was presented by any party regarding the tradename, manufacturer or supplier of the product; and (3) Newport News Shipbuilding and Dry Dock Company (NNS). *See John Crane's Petition*, Appendix, at 24a-30a, 174a-200a. Importantly, none of the identified entities were parties to the lawsuit, no evidence was offered against NNS, and no liability or causation evidence was offered concerning any of products discussed in (1) and (2) above. Additionally, the two insolvent entities, Johns-Manville and Flexitallic, are immune under a bankruptcy stay and a court-approved bankruptcy trust distribution process. And NNS, Mr. Oney's statutory employer under the Longshore

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[2] Flexitallic, now owned by Federal Mogul Corporation through Gasket Holdings Inc., is still protected by the Bankruptcy Code's automatic stay. *See* 11 U.S.C. § 362. Johns Manville went through bankruptcy and now has a court approved bankruptcy trust (the Trust) that is able to pay only 5% of the scheduled liquidated value of $350,000 to beneficiaries.

and Harbor Workers' Compensation Act, is immune to apportionment under this Court's decision in *Edmonds*.

Apportioning damages among these sources would have violated this Court's maritime apportionment decisions and undermined at least two primary tenets of the "well-settled" joint and several liability that John Crane concedes governs this case. First, such an apportionment would have violated the "clear . . . right of a plaintiff, having suffered such a loss, to sue in a common-law action all the wrong-doers, or any one of them, at his election." *Coats*, 61 F.3d at 1125 (quoting *The Atlas*, 93 U.S. at 315). This Court has repeatedly held that maritime joint and several liability permits "an injured party to sue a tortfeasor for the full amount of damages for an indivisible injury that the tortfeasor's negligence was a substantial factor in causing, *even if the concurrent negligence of others contributed to the incident.*" *Edmonds*, 443 U.S. at 260 (emphasis added); *The Atlas*, 93 U.S. at 315. But under John Crane's approach, the plaintiff would lose this valuable right to determine whom to sue.

The second tenet of joint and several liability requires the wrongdoing tortfeasor to "bear the burden of identifying other responsible parties and *demonstrating* that some of the costs of the injury should be spread to them." *Ayers*, 538 U.S. at 165 (emphasis added). But John Crane's proposal shifts this burden to the plaintiff. In *Ayers*, this Court held that FELA incorporates maritime's "traditional rule" of joint and several liability. *Id.* at 163 (citing *The*

Atlas, 93 U.S. at 315 and quoting 42 Cong. Rec. 4536 (1908) (remarks of Sen. Dolliver)). Under maritime joint and several liability principles, it is the wrongdoing tortfeasor, not the innocent plaintiff, who must bear the risk of noncollection. *See Coats*, 61 F.3d at 1116 (noting under maritime joint and several liability, "the risk of noncollection is borne by the defendants"); *see also McDermott*, 511 U.S. at 220-21 ("Joint and several liability . . . can result in one defendant paying more than its apportioned share of liability"); *Edmonds*, 443 U.S. at 273 n.30 ("[A] person whose negligence is a substantial factor in the plaintiff's indivisible injury is entirely liable even if other factors concurred in causing the injury.").

If the trial court had allowed the allocation sought by John Crane, the Plaintiff would be facing a fragmented judgment against John Crane, insolvent nonparties, an immune employer, and generic product types that may not have contained any asbestos and with no entity from whom to collect. John Crane's damages would be limited, but the risk of noncollection would be placed entirely upon the Plaintiff with no recourse to collect against any of the other allocated amounts.

A. Maritime Allocation Of Damages For Comparative Fault Under *Reliable Transfer* And Set-Off Under *McDermott* Require Proof Of Fault Against Parties Or Settling Entities.

This Court's decisions permit allocation in maritime actions only in two instances: (1) allocation in the nature of contribution against other comparatively negligent parties at trial pursuant to *Edmonds*, *Reliable Transfer*, and their predecessors (comparative negligence allocation), or (2) setoff for the proportionate fault of settling parties pursuant to *McDermott* (setoff allocation).

Comparative negligence allocation is simply an extension of maritime's longstanding divided damages rule in ship collision cases. *See, e.g.*, *The North Star*, 106 U.S. 17, 20 (1882) ("The rule of admiralty in collision cases, as we understand it, is that, *where both vessels are in fault*, they must bear the damage in equal parts . . . ." (emphasis added)); *Crain Bros., Inc. v. Wieman & Ward Co.*, 223 F.2d 256, 258 (3d Cir. 1955) ("Where two parties *are jointly responsible for injury* to a third, each is primarily liable for only one-half the damages." (emphasis added)). This Court approved the application of comparative negligence allocation in non-collision cases in *Cooper Stevedoring Co. v. Kopke*, 417 U.S. 106, 113 (1974). And it softened the "harshness" of the "equal division of damages" in *Reliable Transfer Co.*, 421 U.S. at 406, by adopting a comparative negligence approach. But throughout its development, comparative negligence allocation

has always been in the nature of a contribution shortcut.[3] *See Edmonds*, 443 U.S. at 271 n.30 (explaining that where the appropriate parties "*are already before the court* . . . a separate contribution action is unnecessary, and damages are simply allocated accordingly." (emphasis added)); *The North Star*, 106 U.S. at 21 ("By the maritime law this is a case of average loss or contribution").

Under the second type of allocation, setoff allocation, this Court's decision in *McDermott* permits factfinders to allocate fault for *setoff* purposes when the plaintiff has settled with a co-defendant. *See McDermott*, 511 U.S. at 202. *McDermott*, however, was careful to distinguish between the setoff allocation it was recognizing there, and the comparative negligence allocation it had long recognized in *Reliable Transfer, Edmonds*, and their predecessors. *See McDermott*, 511 U.S. at 221 ("*Unlike the rule in Edmonds*, the proportionate share rule announced in this opinion applies *when there has been a settlement*." (emphasis added)).

Though this Court attempted to harmonize the allocation schemes under both *McDermott* and *Reliable Transfer/Edmonds* by dubbing the *McDermott* setoff allocation a "proportionate share" allocation, the two types of allocation are conceptually distinct. One is for streamlined

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[3] Where one of the negligent parties was the plaintiff, this rule also ameliorated the harshness of the common law's strict contributory negligence bar by allowing the plaintiff to recover all amounts not apportioned to him. *See, e.g., Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409 (1953).

contribution against a nonsettling party; the other is for setoff against a settling party.

Even though they are distinct, apportionment of damages under both comparative negligence allocation and setoff allocation requires proof of fault.[4] With regard to comparative negligence allocation, the first time this Court was asked to review the fairness of the equal division of damages rule, it determined that there was insufficient evidence of fault against the allocation defendant. Accordingly, the Court held "there is no occasion to consider how damages should be apportioned . . . ." *Union Oil Co. v. The San Jacinto*, 409 U.S. 140, 146 (1972); *see also Cooper Stevedoring Co.*, 417 U.S. at 115 ("Contribution rests upon a finding of concurrent fault."); *The North Star*, 106 U.S. at 28 (holding that "it being ascertained that both parties were in fault" apportionment was appropriate).

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[4] Neither has any other jurisdiction the Plaintiff is aware of. John Crane mentions statutory provisions in Texas and Louisiana as models of the allocation it envisions, but even in those jurisdictions the party seeking allocation must prove causation and fault on the part of the allocation defendant. *See*, e.g., Tex. Code Civ. Prac. § 33.003 (requiring the factfinder to determine the percentage of responsibility of various entities, but stating that "[t]his section does not allow a submission to the jury of a question regarding conduct by any person without sufficient evidence to support the submission"); *Socorro v. New Orleans*, 579 So. 2d 931, 942 (La. 1991) (noting that under Louisiana's Uniform Comparative Fault Act, "in determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relationship between the conduct and the damages claimed.").

Similarly, the early, pre-*McDermott* proportionate fault setoff decisions of the lower federal courts recognized that a "tortfeasor seeking to assert a reduction by the degree of fault of alleged joint tortfeasors must prove by a preponderance of the evidence that the settling defendant was, in fact, at fault." *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246, 1248 (5th Cir. 1979); *see also Bordelon v. Consolidated Georex Geophysics*, 628 F. Supp. 810, 812 (W.D. La. 1986) ("The plaintiff does not have the burden of proof on this issue. It is the non-settling alleged joint tort-feasor who must come forth and prove that the settling alleged joint tort-feasor was at fault and that this fault caused the injuries sustained by the plaintiff.").

John Crane has argued in the trial court and here that, in the wake of *McDermott*, if a defendant merely identifies a "potentially responsible entity" (or even a suspect generic product) — without anything more — it may obtain both comparative negligence allocation against nonsettling entities, and setoff allocation against settling entities. Nothing in *McDermott* supports this contention. To the contrary, this Court reiterated the settled proposition that "the relative fault of the parties will have to be determined" and that under "the proportionate share approach, the allocation will take place at trial." *McDermott*, 511 U.S. at 216-17. As Professor Schoenbaum noted ten years after *McDermott*, "the non-settling defendant at trial must present evidence of the settling defendant's liability just as it would if presenting a claim for contribution." 1 Shoenbaum, ADMIRALTY AND MARITIME LAW § 5-19, at 256.

This stands to reason. Without evidence of fault against the proposed allocation defendant, a factfinder has no basis on which to make a relative allocation of damages. Moreover, setoff is an affirmative defense and the defendant asserting this affirmative defense has the burden of proving it. *See, e.g., Davis v. Odeco, Inc.*, 18 F.3d 1237, 1246 (5th Cir. 1994) (noting that setoff is an affirmative defense under maritime law); *see also Dobson v. Camden*, 705 F.2d 759, 770 (5th Cir. 1983) (stating "the party desiring a reduction in judgment on account of a settlement has the burden of proving its entitlement to that reduction by showing another party shares responsibility for the injuries and submitting jury issues on relative fault/causation."); Restatement (Third) of Torts; Apportionment of Liability, § 16, comments c, f (1998) (stating that "*the defendant has the burden of proof* that the settling tortfeasor's tortious conduct was a legal cause of plaintiff's injury, that there was a settlement, that the settlement was for the injuries for which the plaintiff is suing, and that defendant would

otherwise have a valid contribution claim against the settling tortfeasor." (emphasis added)).[5]

Finally, the underlying rule of joint and several liability has always applied to comparative negligence allocation and *McDermott* reaffirmed it for setoff allocation as well. Thus "[w]here two parties are jointly responsible for injury to a third, each is primarily liable for only one-half the damages . . . with a provision that if the libellant cannot collect any part from one, that amount should be assessed against the other in addition to the one-half for which it is primarily liable." *Crain Bros., Inc.*, 223 F.2d at 258.

In short, John Crane concedes that joint and several liability governs maritime law, and the only two caveats to joint and several liability — apportionment for comparative negligence and apportionment for setoff — required John Crane to prove the contributing fault of any additional nonsettling parties, or any settling co-defendants.

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[5] Though *McDermott* noted that under its setoff rule there would be no separate contribution actions among the defendants, this should not be construed to be a disapproval of maritime contribution actions in general. Rather it was a recognition that since the necessary parties would already be before the court and their proportionate liabilities could be established during the original action, additional contribution actions for setoff were not necessary and ought not be allowed. Outside the setoff context, maritime contribution actions are still available against non-settling entities that were not parties to the original action. Thus, even now, if John Crane had a good faith belief that another non-party company's products contributed to Mr. Oney's death, it should be able to seek contribution against that company in a separate action under maritime law.

B. The Trial Court Correctly Understood Maritime's Joint And Several Liability And Apportionment Law And Prohibited Additional Allocation Because John Crane Failed To Shoulder Its Burden of Proof.

The trial court understood and properly applied maritime's unambiguous joint and several liability and apportionment law. It precluded apportionment against entities other than Garlock — not because it thought maritime law precluded apportionment — but because there was insufficient evidence to support an allocation of fault for setoff or comparative negligence against any entity other than Garlock.

John Crane offered no evidence relating to any duty or any breach of duty by Johns-Manville, Flexitallic or any other entity. And, there is no evidence anywhere in the record establishing a causal link between any Johns-Manville product, any Flexitallic product, or any other product and Mr. Oney's mesothelioma. At page 27 of its Petition, John Crane gives a string citation of transcript pages that it claims "proved Johns-Manville and Flexitallic's unquestionable and substantial contribution to the cause of Mr. Oney's disease." But those citations merely refer to Mr. Oney's or his co-workers' identification of Johns-Manville or Flexitallic products, and Dr. Maddox's testimony that *if a product released respirable asbestos fibers that were inhaled by a plaintiff*, those fibers would be a contributing factor in the plaintiff's disease. As

discussed above, however, there is no independent evidence in the record establishing that those products, or any other manufacturer's product, (1) contained asbestos or, if so, how much asbestos it contained, (2) whether any asbestos fibers were released when the product was handled, (3) whether any fibers that may have been released were encapsulated in binders, (4) whether any uncoated fibers that were released would have been respirable, (5) the regularity and frequency with which any such product was used around Mr. Oney, or (6) any other specific evidence of exposure. John Crane raised each of these points before the jury in its primary defense against the Plaintiff's claims. And the Plaintiff established all of these points with regard to John Crane's and Garlock's products through her materials expert, Dr. Longo. This is why the Plaintiff, in fairness, did not object to the allocation against Garlock. But John Crane offered no proof of any of these matters against any other manufacturer's product.

Because of this utter lack of evidence against any other entity, the Plaintiff moved to strike John Crane's comparative negligence and setoff claims against any entity other than Garlock. *See John Crane's Petition*, Appendix, at 51a-58a. And during argument against the Plaintiff's motion, John Crane was unable to cite any specific evidence against any other entity. To be sure, John Crane was unable to so much as identify any entity other than Johns-Manville, Flexitallic, and Garlock and, instead, asked the trial court to create a completely new type of nonbinding allocation against generic product

types like pipecovering and cloth.[6] *See John Crane's Petition,* Appendix, at 28a-30a, 54a. The trial court declined the offer and granted the Plaintiff's motion to strike John Crane's comparative negligence and setoff claims against any manufacturer but Garlock. *See id.* at 58a. John Crane never appealed the trial court's decision to strike those claims, and that decision is now the law of the case.

C. John Crane's Request To Apportion Damages Against Johns-Manville And Flexitallic Would Have Required The Trial Court To Violate A Bankruptcy Stay And The Clear Terms Of A Court-Approved Bankruptcy Trust Distribution Process.

Relying on *McDermott's* treatment of AmClyde as an "immune" but apportionable entity, John Crane contends that *McDermott* now permits allocation against all immune entities. *See John Crane's Petition*, at 28-29. But this is not true. In *McDermott*, the source of AmClyde's immunity was a preexisting contract "with McDermott," the plaintiff,

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[6] John Crane now seems to have abandoned its argument that allocation may be made against generic product types for which no manufacturer is identified. John Crane also appears to have abandoned its argument that a court might apportion fault against Mr. Oney's statutory employer, the Newport News Shipbuilding and Dry Dock Company. *Cf., Edmonds,* 443 U.S. at 268-70; *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952); 1 Shoenbaum, ADMIRALTY AND MARITIME LAW § 5-18 (3), at 252 (noting "there is no right of contribution against a joint tortfeasor who is immune from a suit brought by the injured party").

that "provided that free replacement of defective parts 'shall constitute fulfillment of all liabilities . . . whether based upon Contract, tort, strict liability or otherwise.'" *McDermott*, 511 U.S. at 210 n. 10. This Court specifically noted that no party had appealed the circuit court's decision finding AmClyde immune to suit under the contract, and that the plaintiff had not asked that AmClyde's share be absorbed by the other nonsettling defendant, River Don. This Court decided that the best way to view AmClyde's contract was as a preexisting, "quasi-settlement" entered into by the plaintiff prior to litigation. This is a far cry from the issues in this case.

Here, both Flexitallic and Johns-Manville are bankrupt. Flexitallic, now owned by Federal Mogul Corporation through Gasket Holdings Inc., is still statutorily immune under the Bankruptcy Code's automatic stay provisions. *See* 11 U.S.C. § 362. Thus even if the Plaintiff thought she had a good faith claim against Flexitallic in this case, she could not have brought Flexitallic before the court. John Crane — who apparently had no evidence against Flexitallic either — was, likewise, unable to obtain an apportionment against this judgment-proof entity.

Johns Manville went through bankruptcy and its bankruptcy Trust is administered under a court-approved bankruptcy trust distribution process (TDP). *See 2002 Manville Personal Injury Trust Distribution Process*, *available at* http://www.mantrust.org/FTP/C&DTDP.pdf (accessed March 12, 2008) (hereinafter the "TDP Document"). "[P]laintiffs and defendants . . . are

required to pursue their claims against the Trust *only* as provided in this TDP." *Id.* at 18, ¶ I. (emphasis added). The TDP contains clear procedures for obtaining setoff in proportionate share jurisdictions, which John Crane chose not to follow. *See id.* at 22, 25, ¶¶ I.3(d)(ii)(B) & I.4.

The Plaintiff never filed a claim against the Trust and she informed the court of this fact during both the pretrial hearing and during her motion to strike John Crane's comparative fault evidence.[7] *John Crane's Petition*, Appendix, at 55a, 155a-159a. The Plaintiff was well within her joint and several liability rights to forego making this claim, and if John Crane thought Johns-Manville was partly to blame for Mr. Oney's death, it should have followed the rules set forth in the TDP.

John Crane never filed a third party claim against the Trust. *See TDP Document*, at 19, ¶ I.1.(c). Accordingly, the Trust was never before the Court, was not a party to this action, and was not subject to apportionment under either maritime law or the court-approved bankruptcy TDP. Moreover, even if John Crane had filed a third-party claim against the Trust, it bore the burden of proving Johns-Manville's liability and the proportionate share of damages caused by its products. And, as discussed earlier, no evidence was offered against Johns-Manville on either of these elements. Nevertheless, now that John Crane is liable for a judgment, it may make a contribution claim directly

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[7] Because the Plaintiff never filed a claim against the Trust, she is not a "Trust beneficiary" under the TDP.

against the Johns-Manville Personal Injury Trust under the TDP — assuming it can demonstrate that the Trust is liable — but John Crane has apparently chosen not to pursue such a claim.[8]

In summary, the trial court was apprised of the status of both of these entities. It understood the effect of the bankruptcy stay, the TDP, and maritime joint and several liability. And it correctly declined to allow the jury to allocate damages against these bankrupt entities.

D. John Crane Seeks an Advisory Opinion Regarding Allocation Against Any Entities That Have Never Been A Party To The Action.

Finally, John Crane argues that this Court should cure John Crane's failure to follow basic procedural rules by changing maritime law to give the "jury the ability to apportion fault to all potentially responsible entities . . . ." *John Crane's Petition*, at 35. But this argument ignores two simple facts: (1) John Crane already has that ability, and (2) John Crane chose not to exercise it. John Crane had the ability to obtain good faith apportionment against other responsible entities by bringing those entities before the court and proving

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[8] Though the Trust was originally scheduled to pay $350,000 per mesothelioma claim, through no fault of the Plaintiff, the Trust was grossly underfunded and currently pays "asbestos health plaintiffs" only 7.5% of the scheduled amount. John Crane's failure to pursue a claim against the Trust may be due to the fact that it would likewise be limited to recovering the same 7.5% of the scheduled amount.

their causal role and percentage of fault. Whether John Crane's failure to exercise this option was a tactical decision or simple negligence, John Crane had the ability to bring (or keep) "potentially responsible entities" before the court, but chose not to.

John Crane complains that the current regime is unfair because it gives plaintiffs complete control over what entities are before the court. While the initial decision of whom to sue or whether to nonsuit a party is under a plaintiff's control, that control is limited. If John Crane had a good faith claim against a manufacturer who was not a party to the case, John Crane could have filed a third-party claim. *See* Va. S. Ct. Rule 3:13. Likewise, if John Crane believed in good faith that the Plaintiff's damages were attributable to the negligence of a co-defendant, it could have filed a cross-claim and that cross-claim would have prevented the Plaintiff from nonsuiting that party without John Crane's consent. *See* Va. S. Ct. Rule 3:10; Va. Code Ann. § 8.01-380 (D).

John Crane also complains, without any support, that the Plaintiff was somehow dilatory in providing settlement information and that this prejudiced John Crane's ability to prove an allocation case against its co-defendants. As an initial matter, John Crane has yet to identify to any court a single nonsuited party against which it was prevented from achieving allocation. But more to the point, whether and when the Plaintiff settled with any of John Crane's co-defendants is immaterial for this issue. From the time Mr. Oney

filed his initial complaint over one year before trial, John Crane knew the identity of its co-defendants. Nothing prevented John Crane from filing cross-claims against one or more of those co-defendants and, as stated earlier, filing a cross-claim would have prevented a nonsuit without John Crane's consent. Additionally, nothing prevented John Crane from preparing an allocation case against those co-defendants. Indeed, whether or not the Plaintiff settled with any co-defendant, John Crane still would have had to present evidence establishing the relative fault of that defendant — either for setoff purposes if there was a settlement or for comparative negligence if there was no settlement. Thus John Crane's settlement-notification complaint is a red herring.[9]

John Crane also seems to contend that *McDermott* obviated the requirement that nonsettling parties be before the court before a comparative negligence allocation may be made. But *McDermott* is a setoff case; it reiterated no less than three times that its opinion was limited to determining the proper approach for determining the setoff shares of settling parties. *See McDermott*, 511 U.S. at 207 (the issue on review is "how a settlement with less than all of the *defendants* in an admiralty case should affect the liability of nonsettling defendants" (emphasis added)); *id.* at

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[9] Moreover, John Crane has been involved in this litigation for almost thirty years. It is well acquainted with the other potential defendants in these matters. And it knows which defendants characteristically settle, and which defendants pursue the type of scorched-earth, no-settlement policy that John Crane pursues.

220 ("*Edmonds* did not address the issue in this case, the effect of a settlement on nonsettling parties. Indeed, there was no settlement in that case. Instead, one can read that opinion as merely reaffirming the well-established principle of joint and several liability."); *id* at 221 ("Unlike the rule in *Edmonds*, the proportionate share rule announced in this opinion applies when there has been a settlement."). *McDermott* also repeatedly reaffirmed joint and several liability — including the clear "'right of a plaintiff, having suffered such a loss, to sue in a common-law action all the wrong-doers, or any one of them, at his election; and it is equally clear, that, if he did not contribute to the disaster, he is entitled to judgment in either case for the full amount of his loss.'" *Edmonds*, 443 U.S. at 260 (quoting *The Atlas*, 93 U.S. at 315). Thus whatever *McDermott* says about the presence of parties before the court should be limited to matters involving setoff credit for settling parties.

But even in the proper setoff context, nothing in *McDermott* says that an entity need not be a party to the action before an allocation is proper.[10] Indeed, the opinion assumes that such would be the case. The very issue considered by the Court was "how a settlement with less than all of the *defendants* in an admiralty case should affect the liability of nonsettling defendants." *McDermott*, 511 U.S. at 207 (emphasis added). And the facts of the case and entire context of the opinion related to

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[10] John Crane also cites *Calhoun v. Yamaha Motor Corp.*, 350 F.3d 316 (3d Cir. 2003), and *Sigler v. Grace Off-Shore Company*, 663 So. 2d 121 (La. App. 1995). But compare *Ebanks v. Great Lakes Dredge & Dock Co.*, 688 F.2d 716, 722 (11th Cir. 1982), *cert. denied*, 460 U.S. 1038 (1983) (finding "it was error for the trial court to distract the juror's attention by requiring it to allocate the degree of fault between the defendant and *a non-party*."); *Joia v. Jo-Ja Service Corp.*, 817 F.2d 908, 917 (2d Cir. 1987) (finding it was error for the trial court to submit to the jury special interrogatories to determine the comparative degrees of fault between a defendant and a *non-party*."). Moreover, *Calhoun* discussed this matter only in *dicta* because the jury rendered a defense verdict. *Calhoun*, 350 F.3d at 325. And in that *dicta*, *Calhoun* relied on *Sigler* and *Sigler* went against John Crane's argument. There, the plaintiff sued three entities, Kilgore Offshore Crewboats, Inc., Grace Offshore Company, and CNA Insurance Company. *Sigler*, 663 So. 2d at 213. The Plaintiff later voluntarily dismissed Grace and CNA. *Id.* at 214. Kilgore, the remaining defendant, sought to bring Grace back in as a third party defendant under a contribution and indemnity claim, but the Court held that it could not because the plaintiff's voluntary dismissal of Grace somehow bound Kilgore as a third-party plaintiff. *Id.* at 214, 215. Nothing in maritime law sanctions that decision, and it certainly does not support John Crane's argument here because it would have precluded John Crane from filing a third-party claim to obtain an allocation.

apportionment among entities that were parties to the action.[11]

Ultimately, however, none of this matters because John Crane not only failed to bring any "potentially responsible entity" before the court, it could not even identify an additional potentially responsible entity other than Flexitallic and Johns-Manville, the two insolvent companies discussed above. As the trial judge observed, "Now, there was never a manufacturer identified — assuming we ever got to that point, there was never a manufacturer identified of that product to vacate the defendant in this case." *John Crane's Petition*, Appendix, at 57a (argument on Plaintiff's motion to strike at the conclusion of John Crane's case-in-chief).

What John Crane really wants is to be able to obtain apportionment against any entity it can think of without the inconvenience of bringing that entity before the court and proving an apportionment case against it. But, even if this Court were inclined to make such a sweeping change, the Court would have to issue an advisory opinion on a factual record that is devoid — not only of evidence against responsible entities — but even of the mere identification of any "potentially responsible entity" other than John Crane and Garlock (against whom allocation was made) and Flexitallic and Johns-Manville (against whom allocation is prohibited). Thus to decide this issue in this case, the Court would be issuing a

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[11] Even AmClyde, which was later determined to be contractually immune on appeal, was a party to the action.

purely advisory opinion. This Court should deny John Crane's petition.

II. THE TRIAL COURT CORRECTLY APPLIED THE CONTROLLING PRECEDENT AND PROPERLY HELD THAT MARITIME LAW APPLIED TO THIS CASE.

John Crane once again claims that the Virginia Supreme Court erred in construing the *Sisson nexus* test in *Garlock Sealing Technologies, LLC v. Little*, 620 S.E.2d 773 (Va. 2005), and *John Crane v. Jones*, 650 S.E.2d 851 (Va. 2007), *cert. denied*, 552 U.S. ___, 2008 U.S. LEXIS 1326 (Feb. 19, 2008), and that the trial court, likewise, erred in this case by following this precedent. John Crane states that "the facts and arguments" it raised in its petition for writ of certiorari in *Jones* "are substantially similar for purposes of determining whether application of general maritime law is appropriate" in this case. The Plaintiff agrees that the cases are jurisdictionally identical — Garland Jones and Vaughn Oney were both machinists at Newport News Shipbuilding and Dry Dock Company; they both worked regularly with Garlock and John Crane gasket and packing products on ships on the navigable waters of the James River; and they both contracted mesothelioma as a result of this work after a typical 40 to 50 year latency period. Accordingly, like John Crane, the Plaintiff relies on the arguments presented in her Brief in Opposition to Petition for Writ of Certiorari in *John Crane v. Jones*. For the reasons stated in that Opposition,

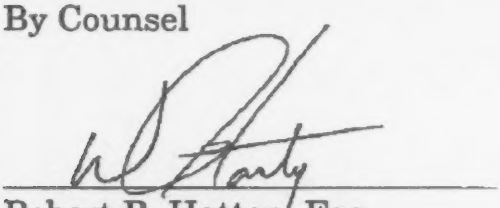
this Court should deny John Crane's petition on this issue.

CONCLUSION

For the foregoing reasons, the Plaintiff requests that this Court deny John Crane's Petition on both questions presented.

Respectfully Submitted,
SANDRA KAY ONEY, Executor of the Estate of SHARON VAUGHN ONEY, deceased

By Counsel



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APPENDIX

ENTERED April 2, 2007

VIRGINIA:
IN THE CIRCUIT COURT OF THE CITY OF NEWPORT NEWS

SANDRA KAY ONEY, Executor Of the Estate of SHARON VAUGHN ONEY, Deceased, Plaintiff,	)	AT LAW NO. 00301TF
v.	)	
JOHN CRANE, INC., Defendants.	)	

TRANSCRIPT OF PROCEEDINGS
Newport News, Virginia
DAY 6
April 2, 2007

BEFORE:
THE HONORABLE TIMOTHY S. FISHER, Judge, and a Jury.

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ON BEHALF OF THE PLAINTIFF:

	DIRECT	CROSS	ReD	ReX
Kenneth M. Bond, Sr.	1180/1236	1213	1231	1235
William E. Longo, PhD	1240	1348	1394	--

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Q. Did you do a background analysis so that you could compare what the level was in your lab with what you actually found in the test?

A. Yes, sir, we did.

Q. And without the Tyndall lighting could you see the asbestos -- or could you see dust?

A. No, you could not.

Q. What was the background in your lab chamber that you measured when you began your test?

A. The background ranged from 0.0002 to 0.0007.

Q. So, did you determine or reach a conclusion as to whether or not the product had the capacity to release fibers over background levels?

A. Yes, sir.

Q. And what was that conclusion?
A. That it did.
Q. And by approximately how many – what's the relationship between the background and the fiber release as you determined it in terms of multiples?
A. Approximately a hundred times over background.
Q. Okay. Now, did you also do -- and I'm going to get to the videos in a minute, but rather than do all these separately, did you also do a test of gasket material to determine whether or not the foreseeable use of gasket material, the John Crane 2150, had the potential to release asbestos fibers?
A. Yes, sir, during the fabrication, using a ball-peen hammer.
Q. All right. And when was that test done?
A. I believe that test was done in 2006.
Q. Okay. And can you tell the ladies and gentlemen of the jury how you structured that test and what you determined?
A. Well, again, inside our room we took a flange and took about one-foot square sheets of John Crane 2150 gasket and with a ball-peen hammer tapped out the design of the gasket itself using the flange

as a template. So you lay it over the flange, and

then I guess the semi-sharp edges of the flange will cut through the gasket when you tap it with a ball-peen hammer. And this was a technique that has been described by a lot of different folks who used to work with gaskets, so we wanted to do two things; measure the potential release of asbestos while fabricating these gaskets with a ball-peen hammer, and then, secondly, after fabrication, see what the release was if individuals actually took a file and smoothed up the inside surfaces of the gasket. So it was really two studies in one.

Q. All right. What did you determine was the potential for asbestos fiber release from making a gasket with a ball-peen hammer on a flange?

A. Without doing any filing, just making the gasket, the fiber release levels were around 1.4 or 1.5 fibers per cc, on average, as I recall.

Q. 1.4 fiber per cc, on average. And when you used the file did that number change?

A. It increased it, which was to be expected.

Q. Do you know what the increase was?
A. I'd have to look at my results. Sorry.
Q. Okay,

A. I think it's around 2.0, 2.5, but I'd just rather check to be sure.
Q. Okay.

(There was a pause in the proceedings.)

THE WITNESS: Approximately three fibers per cc.

BY MR. HATTEN:
Q. All right. On -- I think you -- how many fibers did you say would be released in a year if you worked at a one-fiber level for a whole year?
A. I don't know how many would be released, but --
Q. I mean breathed.
A. But if somebody inhaled one fiber per cc for a working year it's approximately a billion.
Q. Okay. All right.
Now, this test, though, was not intended to measure what any individual's exposure could be.
Is that correct?
A. No, sir, it was for the potential.
Certainly it's very feasible that individuals who used to do this work had exposures of this magnitude fabricating gaskets; they may have higher, they may have lower. But this study showed the potential, so

we know that there's the potential for exposure if you

do this type of work activity.

Q. Okay. Now, did you -- was anyone else asked to check your test results and determine whether or not they were scientifically capable of being duplicated?

A. Yes.

Q. Who was that?

A. Dr. Jim Millette from MBA.

Q. All right. And what is that? What is MBA?

A. He's actually, I guess, a competitor of mine and has a laboratory about 30 miles away from mine.

Q. All right. To your knowledge, did he do the same test and try to -- the same methodology?

A. Yes, sir, that's my understanding.

Q. All right. Now, let me ask you, on this gasket material what did you find was the -- or did you find that there was any tremolite contamination in that gasket?

A. Yes, sir. We performed the more sensitive tremolite test, and the concentration was 0.025 weight percent.

Q. Did you determine whether or not this making of gaskets with the ball-peen hammer had the

potential to contaminate the workers' clothing?
A. Yes, sir.
Q. What did you find?
A. The clothing sample had, on average, 75 million asbestos structures per square foot of clothing.
Q. Back on the valve packing study did you determine whether or not there was any potential for contamination of clothing on the valve packing study?
A. Yes.
Q. What did you find?
A. That the maritime machinist who was doing this work -- the clothing sample that we took off of his work clothes showed a level of approximately 250 million asbestos structures per square foot of clothing.
Q. What was the percentage of asbestos that you found in that gasket material?
A. 60 percent by volume of chrysotile.
Q. And what was the percentage of asbestos in the valve packing? I keep jumping back and forth.
A. The 6AM?
Q. In your air sample test of valve packing. Did you test the percentage of asbestos in Valve Packing Study No. 2?

A. Well, we tested the concentration, the amount of asbestos that was in the valve packing, and it averaged about 50 to 60 percent by volume. And then the material that went back in, our study showed that it was approximately 70 percent by volume of chrysotile.

Q. And that was chrysotile?

A. Yes, sir.

Q. Now, on that test you didn't make any determination about whether or not it was contaminated.

A. That's correct.

Q. And when was the first time that you started doing the contamination test to determine the amphibole in the asbestos?

A. 2002, maybe. 2001, 2002.

Q. So the valve packing test was done before you started doing that tremolite --

A. More sensitive testing, yes, sir.

Q. Now, when Dr. Millette did the same test that you had done were his results comparable to what you found?

A. Yes, sir, they were, I thought, very consistent.

Q. What did he find in terms of the fiber

release from making gaskets with a ball-peen hammer?
A. His ball-peen hammer just fabricating the gaskets with a ball-peen hammer he averaged approximately 2.2 fibers per cc.
Q. Is that higher or lower than you had found?
A. It's just a little higher.
Q. And when he filed the gaskets what did he find?
A. His average on filing was 2.0 fibers per cc.
Q. And that was a little lower than you found?
A. Yes, it was a little lower since we filed all six of the gaskets, and he only filed two, so the protocol got changed a little bit there on his side.
Q. All right. What was the percentage of tremolite that he found?
A. I'll have to dig it out of here.
(There was a pause in the proceedings.)
THE WITNESS: He found 0.15 percent tremolite actinolite.
BY MR. HATTEN:
Q. Now, is that a little bit higher than what you had found?

A. That was higher than ours.
Q. Okay. Even though there are some light changes there, how would you compare those two tests?
A. I think for the fiber levels they're extraordinarily similar. To have the exact same study done in another facility with different personnel and have it this close I think is pretty good.
Q. Now, have you done a third study of gaskets?
A. Yes.
Q. And this time with Garlock gaskets?
A. I have.
Q. Now, who paid for the test, 2150 gasket material, the gasket test?
A. You paid for it.
Q. Right. Did I pay for this Garlock one?
A. No.
Q. Who paid for that?
A. Well, nobody paid for that. We were able to get some -- a big sheet of Garlock gasket and we did it ourselves to see if we could -- doing the exact same work procedures, how close the results or how far would they be away with a different manufacturer.
Q. All right. And the third time you did the test you did the same procedure?

MR. O'CONNELL: Objection; leading, suggestive.

BY MR. HATTEN:

Q. Did you do the same procedure?

A. The second time we've done the test --

Q. The second time you did it. Millette did it once, and you are doing it the second time?

A. We used the exact same protocol.

Q. And with the gaskets made by Garlock, were they of a similar composition?

A. Yes, sir, they were. They were found to contain 80 percent by volume of chrysotile.

Q. Okay. Did you do a tremolite test on them?

A. We have not finished that one yet.

Q. Okay. In the Garlock test what were the levels for the ball-peen hammer?

A. The -- just the ball-peen hammer, the personal samples were 1.3 fibers per cc.

Q. And you had had 1.4 on your previous test?

A. Actually, I looked at the average here, and it was 1.5.

Q. 1.5. So, is the 1.3 as opposed to the 1.5 -- again, was that -- how did that compare, in

your mind?
A. For this type of study, that's very, very close.
Q. For the filing?
A. For the filing we had 2.8.
Q. All right. How did that compare?
A. Again, that was very close.
Q. Okay. Now, as a scientist when you do a test on multiple occasions and you achieve similar results, what does that tell you about the validity of the test?
A. Well, the more you repeat the same test and get similar results, it tells you you have a very high confidence in your results; that you can demonstrate over and over again doing the same types of work practices -- generate the sameresults, so you can have a very high confidence in the study.
Q. Okay. Now, how did these numbers compare to background levels? Let's go back to the findings by Dr. Millette, 2.2 and 2.0. How does that compare to background?
A. Let me see what Dr. Millette's background levels were.
Q. Okay.
(There was a pause in the proceedings.)

A. Well, Dr. Millette's is hard to determine. He just has less than 0.01, but if you look at and accept 0.01, that would be approximately 200 times.

Q. Okay. And how about compared to your background?
Now, is this because of the -- why would that be a 0.01? What was the instrument used there?

A. Well, he has 0.01 -- he just has less than 0.01.

Q. Do you know what instrument he used?

A. That would be phase contrast microscopy. He just didn't report it, all the zeros. So, if I had his worksheet I could probably tell you what it is.

Q. All right. On your own fabrication of 2150 how many -- the three fibers per cc, how many times is that, then, the background that you measured?

A. Our background, on average, was 0.004 fibers per cc. So, the fabrication was about 1.5...

(Pause.)

For fabrication, our results were 3,750 times above background.

Q. And when you filed it?

A. Well, the filing was essentially almost double, so --

Q. It would be 7,000 times?
A. Yes, sir, above background.
Q. Now, as compared to the background of the United States Department of Labor and the average outdoors in the United States, if that was five zeros and a two for the -- according to the Department of Labor as to what the background is, how would your test results compare to that?
A. For our fabrication without filing it would be 750,000 times above background.
Q. All right. And for Dr. Millette's test how would that compare?
A. For Dr. Millette's, which I think his was 2.2, his would be approximately a million times above background.
Q. All right.
A. A million times that background.
Q. A million times what the Department of Labor says is the background level?
A. Right.
Q. Okay. Now, have you now also done testing to determine the potential of fiber release from removing gaskets?
A. Yes, sir.
Q. And what did you find, and how did you do

it?
A. Well, again, we had steam flanges that had been removed from a power plant in Oregon, and we hired a steam fitter, union steam fitter, that had worked in the field for 30 years, and he had retired, so we hired him to come in and trained him how to work in a confinement area with a respirator, and asked him to remove the gaskets just like he used to on the job. We took him to -- essentially, we took him to Lowe's and had him buy the tools, and he went inside the room, opened the flanges, and first used scraping and hand wire brushing and then used scraping and electric grinding, and we had him do it the same way he said he used to do it on the job. And we made the measurements doing that, and that would be gasket 4 and 5. Gasket studies 1,2, and 3 -- we've done a lot of gasket studies -- I actually did the gasket removal, and I'm not a steam fitter, and I've never been on the job and I did the removals. So, for gasket four we actually had a guy who had done it.

Q. So you had done studies before in which you did the work?
A Yes, sir.
Q. And this time you got --
A. A professional.

Q. All right. Now, what did you determine was the potential for asbestos release from these various activities of scraping, hand wire brushing and power brushing?
A. Just using the one study, even though, interestingly enough, all the studies were pretty consistent, even without the professional scraping the gaskets.
Q. Even the ones you had done?
A. Yes, sir, his results were on average a little higher than mine. But from his study, using the scraping and the hand wire brush, as I recall, it was about 2 to 4 fibers per cc, the potential for release when we did the study.
Q. Is this your study?
A. Yes, sir, it is.
Q. And what did you determine, 2 to 4 fibers for hand wire?
A. Yes, sir, 2.3 to 4.4.
Q. Now, is that higher than what you had found from making gaskets?
A. You know, with the actual spread in the analysis it's pretty close.

Q. About the same?
A. It's a little higher, but statistically I don't think there would be that much difference there.
Q. All right. What did you find from the power brushing was the potential for fiber release?
A. Now, that ranged higher. The low sample -- that was on the very first one he started -- was four fibers per cc, and the high one was 24 fibers per cc.
Q. How does that compare to the making gaskets and the valve packing?
A. They're all higher, much higher.
Q. Okay. Now, did you in any of these studies use the old method of counting particles instead of fibers so that you might be able to compare one to the other?
A. Yes, sir, we used the impinger method that was the standard test method in the '40s, '50s, and '60s.
Q. All right. And what did you find when you used the impinger?
A. For the scraping and hand wire brushing we found a level of eight million particles per cubic foot.
And we took another sample and we were

using the electric grinder, and that was much higher.
That was approximately 25 million particles per cubic

foot.
Q. 20-how-many? 25?
A. 25 million.
Q. How did that compare to the old level of five million particles per cubic foot?
A. Well, you can compare it a little. It's higher than five million particles per cubic foot, but
to be fair, that standard is a time-weighted average
Q. All right. So, did you ever use the impinger method for any of your other testing?
A. Yes, we have.
Q. What other testing have you used the impinger method for?
A. We've used the impinger method on our thermal insulation testing, our joint compound
testing, and a few others.
Q. All right. On the removal of gaskets did you test the clothing of the worker?
A. We did.
Q. And what did you find?
A. (Pause.)
I know it's in here. Hold on.
(There was a pause in the proceedings.)
THE WITNESS: The average concentration
on the clothing for the worker and for the helper was

approximately 1.3 billion asbestos structures per square feet of clothing.

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Q. Now, have you had an opportunity to see whether or not the Newport News Shipyard has done any tests which reached comparable results to what you did on this type of material?
A. Yes, sir, they did almost the same kind of activity.
Q. All right. Let me show you a document that's dated July 27, 1982.
A. Yes, sir, I've seen this.
Q. And can you explain what that study shows?
A. Well, they were using an angle grinder to remove gaskets off flanges, and it's the exact same tool we used. I called it a side grinder. And they took air measurements for the asbestos fiber amounts that were being released.
But one of the -- but the big difference here is when they did this study they soaked the gaskets on the flanges with wet rags to try to keep the dust down, and they also used local exhaust

ventilation, so they were actually trying to put some industrial hygiene techniques in to keep the fiber levels down.

Q. Did you do either one of those things in your own tests?

A. No, we did not.

Q. And what was the -- what were the test results that they found -- what was the potential for fiber release from the same activity that you had done?

A. Their results -- they had three results. They had 6, 10, and 29 fibers per cc. So their results are consistent with my results.

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Q. Did the shipyard do any other tests that you found were consistent with your own results?

A. Yes, sir, we have another study here that was done on one of the catapults with an angle grinder, a gasket that had a nickel -- a copper nickel sheathing around it.

Q. Were controls used on that?

A. They put it inside of -- they had a tent, but it doesn't look like they used any wetting procedures, et cetera. And they had a range of 0.6 to 8.6 fibers per cc.

Q. And is that in the range of what you had found from your own power grinding?
A. On the lower side, yes, sir. The 8.0 was consistent with the power grinding.
Q. All right. Now, how about the valve packing? Were there tests at the shipyard in the '80s, '90s?

A. Yes, sir, there was.
Q. And what were they?
A. Valve packing removal -- they had a range of 0.01 to 0.05.
Q. And was that with controls or without?
A. With controls.
Q. Was yours with controls or without?
A. Ours was without.
Q. And what were the types of things that they did to control the dust?
A. Cutting the pieces in plastic bags, wetted then cut inside of a bag, using clean-up. So, there were drop cloths, vacuum up the debris. This was just all cutting. So, they were cutting it with some controls.
Q And this was when? In the '90s?
A. '96.
Q. '96. This is after Mr. Oney left?
A. That would be correct. He left in '92, if I'm not mistaken.
Q. '94?
A. '94. Sorry.
Q. All right. Any other tests at the shipyard that were consistent with your own?

A. I have another study here -- they were removing gaskets from pipe flanges using just a hand scraper, with controls.
Q. When was that?
A. This was done in '98.
Q. Again after he left?
A. Correct. And they --
Q. And what were the findings?
A. They removed asbestos gasket from pipe flange using amended water and a hand scraper and a vacuum and a drop cloth, and according to this they had a peak exposure of 0.3 and a time-weighted average of 0.12 fibers per cc.
Q. 0.12?
A. Correct.
Q. Okay. Are all these numbers above background?
A. Yes, sir, they are, way above background.
Q. Way above. Are all these numbers way above background (indicating)?
A. Yes, sir.